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No. 96-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL LEAHY, et al.,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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REPLY

The City's contention that the overtime provision of a collective bargaining agreement eliminates any requirement of a threshold determination of whether certain "on duty" time is compensable work time under the FLSA is erroneous and is an issue of considerable importance and affect. The City does concede that the first 7th Circuit Court of Appeals opinion reversed the district court's judgment because a majority of the panel decided that frequency of interruptions, taken together with restrictions imposed by the department, could convert meal periods to working time (p. 3 of Respondent's Brief). Judge Cudahy and Judge Crabb agreed that the test of compensability under the FLSA is whether the meal period was predominantly for the benefit of the employer. Judge Crabb, in her concurring opinion, specifically noted in reference to plaintiffs' allegations, that "when all reasonable inferences are drawn in favor of the officers, the allegations support an inference that the officers' meal periods are primarily for the benefit of the employer" (Pet. App. at C-17).

The City's effort to distinguish *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981) on the ground that it involved an arbitrator's decision that the collective bargaining agreement resolved the issue of FLSA compensability, rather than a district court's decision, does not hold water. The *Barrentine* Court clearly recognized that there is a difference between the collective rights of workers under a union's bargaining agreement and the individual rights of workers under the FLSA. The union cannot negotiate away the individual rights of workers under the FLSA.

The City's reliance on *Tennessee Coal Iron & Railway Co. v. Musada Local No. 123*, 321 U.S. 590 (1944) is also misplaced. In *Tennessee Coal*, the Court was concerned with a situation in which it was difficult to ascertain how much time a particular activity involved. i.e. how much time it took iron ore miners to travel to and from their underground worksite. For example, it might take some 15 minutes and others 30 minutes. In such circumstances, reasonable agreements could be entered into to govern the amount of work time to be assigned to that activity. In the present case, there is no such issue. The time period under consideration is clearly defined. The time involved is the 30 minutes of each 8½ tour of duty and the issue is whether that defined time period is compensable time under the FLSA.

This Court, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), recognized that "on call" time beyond the regular work day could fall within the FLSA, depending on various factors "and all of the surrounding circumstances". 323 U.S. at 135. The patrol police officer's meal period presents a much stronger case for compensability than the usual "on call" situation. During the 30 minute meal period, the officer is clearly "on call". However, he or she is required to be in uniform, in their own patrol district, in continuous radio contact and subject to a variety of other restrictions designed to enhance the community's awareness of the police presence. The department expects, as does the community, that the officer is available during that time to respond to citizen inquiries, on view problems and emergencies and radio dispatched assignments. The officer continues during such time to be exposed to those risks associated with being a uniformed police officer in a metropolitan city.

The City appears to contend that the "predominant benefit" theory adopted by the Leahy Appeal I panel, as formulated by the Tenth Circuit in *Lamon v. City of Shawnee*, 972 F.2d 1145 (10th Cir.1992), cert. denied, 507 U.S. 972 (1993), has no application when there is an overtime pay provision in the collective bargaining agreement. This does seem to be the holding in Leahy Appeal II, eliminating the distinction between workers' rights under a collective bargaining agreement and the individual rights of workers under the FLSA. If, as petitioners claim, the "predominant benefit" test is to apply, work remains to be done. The City agrees that discovery has not yet been completed on the question of frequency and duration of interruptions (p. 5 of Respondent's Brief). Discovery has also not been completed on the issue of the benefits which accrue to the City in having its police officers in uniform and at risk in the neighborhoods of the City for that extra unpaid 30 minutes every day. What is the effect of this presence on the manpower requirements of the police department? How would the police department's payroll be affected if this extra 30 minutes in the tour of duty was eliminated? Furthermore, if the overtime pay provision of the collective bargaining agreement is to factor in to the factual determination of "predominant benefit", the manner in which the overtime provision is administered by the police department with regard to missed or interrupted meal periods becomes a relevant inquiry.

While we have attempted to avoid arguing facts and evidence in our petition, respondent's brief relies so heavily on mischaracterization of the factual matters in the record before the courts in Leahy II and Leahy Appeal II, that we feel compelled to respond.

1. Respondent dismisses the relevancy of the 240 affidavits filed by police officers in response to the motion for summary judgment. These affidavits were not directed to the merits of the case because that issue was not raised in the motion, but they do provide information that bears on the subject of interrupted and missed meal periods.

The affidavits included those of 162 officers currently assigned to uniform patrol in various districts of the City. Of those, one hundred and five (105) stated that interruptions occurred in 30% to 40% of the meal periods. Thirty three (33) stated that such interruptions occurred over 40% of the time. Eight (8) officers stated that such interruptions occurred over 45% of the time. Another eight (8) officers estimated that interruptions occurred from 50% to 80% of the time. None of the current uniform patrol officers experienced interruptions at less than 30% to 40%. (Pltfs.' Ex. Vol 1, Exhibits A-1 and A-2). Most affiants stated that their experience with interruptions and non compensation were representative of the experience of most officers in their respective districts. The officers describe the nature of the interruptions by the department and citizens and the manner in which they impacted their meal periods in considerable detail.

The officers' affidavits responded to the City's assertion that meal periods were rarely entirely missed and were compensated when so missed. (L.P. Vol. 2, City Rule 12(m) Statement, par. 28). Thirty three police officer affiants stated that they did not receive any meal period 3 or more times per month, with 23 of them stating this occurred 5 or more times per month. (Pltfs' Ex. Vol. 3,

Ex. B). All of the officers agreed that to their knowledge no compensation had been paid for either missed or interrupted meal periods and that no written policy for such compensation was ever promulgated. Plaintiffs' Response contained the affidavits of five sergeants (Pltfs' Ex. Vol. 3, Ex. D). The sergeants joined the officers in stating that it is "well known" that meal period compensation requests are viewed with disfavor and they could not recall ever authorizing any such request for compensation.

2. Respondent's contention that the overtime pay provision of the collective bargaining agreement provided full protection for petitioners' FLSA rights is a regrettable distortion of the record in this case. There is considerable material in the record on the issue of whether officers were compensated for interrupted or missed meal periods, and whether the City had any policy or plan in that regard.

Petitioners deposed 5 District Commanders. It was undisputed that the Chicago Police Department had never issued any uniform policy for missed or interrupted meal periods (Pltfs' Ex. Vol. 6, Ex. S, pg. 68, 74-75; Pltfs' Ex. Vol. 1, Ex. A-1, Vol. 2, Ex. A-2, Vol. 3, Ex. B, C, D). Commander Jeanne Clark, then commander of the 21st District, stated that in the absence of such policy, each district or unit commander had leeway as to how he or she wished to treat interrupted or missed meal periods. (Pltfs' Ex. Vol. 6, Ex. X, pg. 49-50). Different police commanders gave different versions of this practice and procedure. (Pltfs' Ex. Vol. 6, Ex. T, pg. 58-67; Ex. V, pg. 67-22; Ex. W, pg. 51-52). All agreed, at no time did the City provide any written procedures.

Commander Nate Gibson of the 11th District assumed that some compensation might be provided but it would depend upon the "circumstances". He would not provide any criteria to be used in this determination nor state what additional information or requirements an officer needs to meet in order to obtain such compensation, stating it had never happened. (Pltfs' Ex. Vol. 6 Ex. T, pg. 58-67). In contrast to his fellow commanders who acknowledge that part of the officer's duty is to respond to citizen inquiries, even during meal periods, Commander Watson of the 7th District testified that the proper response to an attempted citizen interruption during a meal period is for the officer to tell the citizen to dial 911 or to call the station. (Pltfs.' Ex. Vol 6 Ex. U, pg. 51-58).

The City did not produce a single paid overtime slip for a missed or interrupted meal period in support of its motion. There is no evidence that any police officer ever actually received overtime compensation for an interrupted meal period.

3. The City's statement that officers can and do receive compensation for interrupted meal periods and, if not treated fairly, may resort to the grievance process and press for arbitration, is totally refuted by the record in this case. As stated earlier, the officers' affidavits state that they have never been compensated for interrupted meal periods, nor have they ever heard of any department policy to compensate for such time. The fact is that the City has no policy for compensating for interruptions of the meal period, and that is a logical and natural consequence flowing from the following statement at page 30 of the City's Brief in Leahy Appeal II:

> And because police officers taking lunch in the field are not under the direct observation of their supervisors, the Police Department has no direct way of knowing which of its many officers have been interrupted and for how long on which days.

The City apparently takes the position that if the officer is "out of sight" of his or her supervisor, the officer's own statement as to an interrupted meal period could not be trusted. Neither the City nor its commanders (who have given 5 different versions of the "policy" regarding interruptions) can answer the simple question of what evidence an officer must present in order to obtain compensation for an interrupted meal period.

It is not surprising that the City has no policy or procedure for compensating interruptions of the meal period when one contemplates the volume of such claims if there was such a policy. An estimate of 50 work weeks during a year would involve 250 meal periods. If interruptions occur an average of 35% of the time, that means each officer might annually have an average of 87.5 interrupted meal periods. Multiplied by the approximately 12,000 officers, that would equal potential interrupted meal period claims for overtime compensation of over 1,050,000 per year. It is obvious that the administrative problems for the City inherent in processing and making decisions with respect to such claims would be overwhelming.

4. The grievance process does not protect petitioners' FLSA rights. The City presented evidence of seven grievances having been filed for a missed meal period in a ten year period (Def. Ex. Vol.1, Kimber aff.). The dearth of such grievances, the tortuous process required and the

rarity of success support, rather than refute, the officers' contention that requests for such compensation are viewed with disfavor.

In the grievance process, the officer essentially must prove that for each and every moment of their tour of duty they were occupied with police calls and had no "window of opportunity" to take a meal period. (Pltfs' Ex. Vol. 3, Ex. B). A review of two such grievances demonstrates the point.

In 1984, Officer Fred Vlahovich requested to take a meal break at his assigned time. He and his partner were denied and given an assignment. After completing that assignment, they again requested a meal break and were again denied, being given another assignment. It is undisputed that the officer never received a meal break that tour, despite having made two requests. Officer Vlahovich filed a grievance which was denied. His supervisors reviewed the full tape of his tour and found a thirty minute "window of opportunity" during which they contended he might have asked for a meal period. Since he could have asked for it again at that particular time and it might (or might not) have been granted, the City refused him compensation. (Def. Ex .6, Kimber aff., Ex. I).

In February, 1994, Officer Matkowsky was assigned to guard three prisoners for most of his tour. He received no meal period. His request for overtime was denied because he made no formal request for a meal period during the tour and *might have* obtained one during the last half hour. His grievance was filed in early March of 1994. As of the filing of the City's summary judgment motion in July of 1994, it had proceeded through two

steps of the grievance process and was awaiting arbitration. (Id. Kimber aff., Ex. H).

These two examples, one before and one after the filing of this action, demonstrate that it is difficult, even through the grievance process, to obtain compensation even where the meal period is entirely missed. A fair inference to be drawn from the grievance experience is that neither officers nor their union are encouraged to expend their time, energy and money to pursue denied requests for 30 minutes or less compensation when there is little likelihood of success or prompt resolution. As can be seen from the grievances experience regarding missed meal periods, the City puts the officer to a high degree of proof. No one knows what degree of proof would be required to establish an interruption. It is clear, however, that the officer's word would not suffice.

The fact is that notwithstanding the collective bargaining agreement providing that officers are to be paid time and one-half for all time worked in excess of 8 hours per day and the existence of a grievance procedure, the dynamics of the real world dictate that interrupted and missed meal periods by and large go uncompensated. If this is not indisputably so, it is at minimum a factual issue in dispute.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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